ADMINISTRATIVE OFFICE OF THE COURTS
SUPREME COURT OF ARKANSAS
Stephanie Harris, Communications Counsel

JUSTICE BUILDING
625 MARSHALL STREET
SUITE 0100
LITTLE ROCK, AR 72201-1020

TEL: 501-371-2004
FAX: 501-682-9410

August 27, 2010

ARKANSAS SUPREME COURT SUPPORTS ATTORNEY GENERAL BRIEF ON JUDICIAL RESTRICTIONS

Arkansas Attorney General Dustin McDaniel filed yesterday an *Amici Curiae* in support of a Petition for Rehearing En Banc in *Wersal v. Sexton*, a U.S. Eighth Circuit Court of Appeals case numbered 09-578. The Arkansas Supreme Court requested that the Attorney General file the brief, in which the attorneys general of Iowa, Missouri, North Dakota and South Dakota joined.

Last month a three-judge panel of the Eighth Circuit held unconstitutional Minnesota's rule prohibiting judicial candidates from endorsing other candidates. It also held that Minnesota's rule prohibiting judicial candidates from directly asking for campaign contributions was unconstitutional as applied to the facts in *Wersal*.

Arkansas has similar rules which prevent endorsements and direct solicitation of campaign funds; and the Supreme Court believes that these rules are imperative in maintaining the appearance of and actual fairness and impartiality in our courts. "A judge has a duty to uphold the Constitution and laws, regardless of any personal feelings he or she might have about an issue," said Chief Justice Jim Hannah.

"The importance of fair and impartial courts cannot be understated," Hannah said. "The court rightfully has a concern and an obligation to be sure that the conduct of judges and judicial candidates does nothing to erode the public's trust and confidence in the judiciary. To some extent, judges or judicial candidates should not expect to maintain their rights to unlimited free speech. The people of Arkansas expect and are entitled to courts that are accountable to the law and protect the public's rights without political or monetary influence."

--continued—

Attached are the Attorney General's brief and the *Wersal* case. The attorneys general are asking that all eleven Eighth Circuit judges reconsider the three-judge panel's decision. The decision was 2-1, with Judge Bye dissenting. The Eighth Circuit is a federal court which has jurisdiction over the federal courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

For further information, contact:
Stephanie Harris, Arkansas Supreme Court Communications Counsel
(501) 371-2004 desk
(501) 920-9167 cell
stephanie.m.harris@arkansas.gov

No. 09-1578

IN THE U.S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Gregory Wersal,

Plaintiff-Appellant,

v.

Patrick D. Sexton, et al.

Defendants-Appellees.

On Appeal From The U.S. District Court
For The District Of Minnesota

BRIEF OF THE ATTORNEYS GENERAL OF ARKANSAS, IOWA, MISSOURI, NORTH DAKOTA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

DUSTIN MCDANIEL
Attorney General
State of Arkansas

DAVID CURRAN
Assistant Attorney General
State of Arkansas

323 Center St., Suite 500
Little Rock, AR 72201
(501) 682-3561

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

INTEREST OF AMICI..... 1

ARGUMENT..... 3

I. THE PANEL'S AS-APPLIED INVALIDATION OF MINNESOTA'S DIRECT SOLICITATION CLAUSE CONFLICTS WITH *WHITE II* AND RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE..... 4

II. THE PANEL'S FACIAL INVALIDATION OF MINNESOTA'S ENDORSEMENT CLAUSE RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE. 8

CONCLUSION..... 11

TABLE OF AUTHORITIES

Page

Federal Cases

Bauer v. Shepard,
No. 09-2963, 2010 WL 3271960 (7th Cir. Aug. 20, 2010)..... 6, 9-11

Caperton v. A.T. Massey Coal Co.,
129 S. Ct. 2252 (2009)..... 3-4, 8

Civil Service Comm'n v. Letter Carriers,
413 U.S. 548 (1973)..... 9

McConnell v. Fed. Election Comm'n,
540 U.S. 93 (2003)..... 4

Republican Party of Minn. v. White,
416 F.3d 738 (8th Cir. 2005)..... 3- 4, 6, 10-11

Republican Party of Minn. v. White,
536 U.S. 765 (2002)..... 3-4, 9-11

Siefert v. Alexander,
608 F.3d 974 (7th Cir. 2010).....5-7, 9, 11

Wersal v. Sexton,
No. 09-1578, 2010 WL 2945171 (8th Cir. July 29, 2010) 1-2, 4-6, 8-11

State Cases

Simes v. Ark. Judicial Discipline and Disability Comm'n,
247 S.W.3d 876 (Ark. 2007)..... 7

Federal Rules

Fed. R. App. P. 29(c)(3)..... 2

Fed. R. App. P. 29(a)..... 2

Fed. R. App. P. 35(b)(1)(A)..... 6, 11

Fed. R. App. P. 35(b)(1)(B)..... 6, 11

State Rules

Ark. Code Jud. Conduct, Rule 4.1(A)(3) 1

Ark. Code Jud. Conduct, Rule 4.1(A)(8) 1

Ark. Code Jud. Conduct, Rule 4.4, cmt. 3A 5

Iowa Code Jud. Conduct, Rule 51:4.1(A)(3)..... 1

Iowa Code Jud. Conduct, Rule 51:4.1(A)(8)..... 1

N.D. Code Jud. Conduct, Canon 5(A)(1)(b)..... 1-2

N.D. Code Jud. Conduct, Canon 5(C)(2)..... 2, 5

S.D. Code Jud. Conduct, Canon 5(A)(1)(b)..... 2

S.D. Code Jud. Conduct, Canon 5(A)(1)(d)..... 2

INTEREST OF AMICI CURIAE

The Attorneys General of Arkansas, Iowa, Missouri, North Dakota, and South Dakota ("the States") are the chief law enforcement officers or legal officials of their respective states, each of which is in the Eighth Circuit. The Attorneys General are responsible for defending the constitutionality of their respective states' laws. In addition, the Attorneys General represent their respective states' judicial ethics commissions, which enforce various rules governing judicial candidates' conduct.

In *Wersal v. Sexton*, No. 09-1578, 2010 WL 2945171 (8th Cir. July 29, 2010), a panel of this Court, over Judge Bye's dissent, reversed the district court and held that Minnesota's rule prohibiting judicial candidates from endorsing other candidates was unconstitutional on its face. The panel also held that Minnesota's rule prohibiting judicial candidates from soliciting campaign contributions directly was unconstitutional as applied to the particular facts of the case. Some of the States' codes of judicial conduct contain provisions that are similar to one or both of the provisions struck down by the *Wersal* panel.[1] Indeed, all Eighth Circuit

[1] *See, e.g.*, Ark. Code Jud. Conduct, Rule 4.1(A)(3) (endorsement clause); Ark. Code Jud. Conduct, Rule 4.1(A)(8) (personal solicitation clause); Iowa Code Jud. Conduct, Rule 51:4.1(A)(3) (endorsement clause); Iowa Code Jud. Conduct, Rule 51:4.1(A)(8) (personal solicitation clause); N.D. Code Jud. Conduct, Canon

states, like the majority of states in the United States, subject judges to regular elections or retention elections, and some limits on judicial campaign activities are necessary to protect the due-process rights of litigants and ensure public confidence in the judicial system. Thus, the panel's decision will inevitably impact the manner in which judicial elections are conducted in the States and the balance the States have struck between recognizing free-speech rights, on the one hand, and ensuring an unbiased judiciary and the appearance of impartiality, on the other hand. Rules protecting the public's confidence in judicial impartiality and its perception of a difference between elected judges and elected non-judicial officials are indispensable to the ability of state judiciaries to function.

Because of the far-reaching consequences of the *Wersal* panel's decision, the States have an interest in this case under Rule 29(c)(3) of the Federal Rules of Appellate Procedure. The States are authorized to file this amicus-curiae brief without the consent of the parties or leave of court under Rule 29(a) of the Federal Rules of Appellate Procedure.

5(A)(1)(b) (endorsement clause); N.D. Code Jud. Conduct, Canon 5(C)(2) (personal solicitation clause); S.D. Code Jud. Conduct, Canon 5(A)(1)(b) (endorsement clause); S.D. Code Jud. Conduct, Canon 5(A)(1)(d) (personal solicitation clause).

ARGUMENT

"The citizen's respect for judgments depends . . . upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) ("*White I*") (Kennedy, J., concurring). Even in the majority of states that require judges to stand for election, state codes of conduct serve an important function in ensuring that public confidence in the judiciary is not undermined by the conduct of judges and judicial candidates. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009) ("These codes of conduct serve to maintain the integrity of the judiciary and the rule of law.").

There are, to be sure, limits on how far states can go in limiting the speech of judicial candidates. *See White I*, 536 U.S. at 765 (holding that Minnesota's "announce clause," which prohibited judicial candidates from announcing their views on disputed legal or political issues, violated the First Amendment); *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) ("*White II*") (invalidating Minnesota's "partisan activities" clause, in addition to the state's

"solicitation" clause as applied to letters and large audiences). Notwithstanding those limits, the Supreme Court has never held "that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *White I*, 536 U.S. at 783. In other words, judicial campaigns are different. *Caperton's* fundamental premise is precisely that. If the *Wersal* panel's decision is left undisturbed, however, the States fear that the important line between judicial elections and other elections will fade, jeopardizing the efforts of the States to preserve the public's confidence in an impartial judiciary.

I. THE PANEL'S AS-APPLIED INVALIDATION OF MINNESOTA'S DIRECT SOLICITATION CLAUSE CONFLICTS WITH *WHITE II* AND RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE.

The *Wersal* panel held that the First Amendment prevents Minnesota from enforcing its ban on judicial candidates' direct solicitation of contributions from non-attorneys. *Wersal*, 2010 WL 2945171, at *13-*16. The panel applied strict scrutiny to Minnesota's solicitation rule in accordance with *White II*, although the Seventh Circuit recently held that the more deferential "closely drawn scrutiny" test, as set forth in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136-38 & n.40 (2003), applies to restrictions on solicitations of campaign contributions. *See*

Siefert v. Alexander, 608 F.3d 974, 988 (7th Cir. 2010) (holding that the test of "closely drawn scrutiny" should be applied to Wisconsin's ban on in-person solicitations by judicial candidates but that the prohibition would nevertheless survive strict scrutiny).

In applying strict scrutiny, the *Wersal* panel held that Minnesota's ban on direct solicitations does not further the state's interest in a non-biased judiciary because the risk of bias "comes not in the mere solicitation—the 'ask'—but rather in the resulting contribution." *Wersal*, 2010 WL 2945171, at *14. Therefore, rules prohibiting judges from "tracing funds" back to contributors[2] constitute a "less restrictive alternative" to bans on direct solicitations. *Id.* at *14. According to the *Wersal* panel, one-on-one conversations between judicial candidates and potential donors are mere "fleeting encounters," and judicial candidates will inevitably fail to remember "which solicited person indicated a likelihood of contributing to the campaign or indicated a refusal to do so." *Id.* at *15.

Judge Bye's dissenting opinion offers a more realistic assessment of one-on-one encounters: "As anyone familiar with retail politics can attest, potential donors

[2] Some of the States have similar "don't learn" clauses. *See, e.g.*, Ark. Code. Jud. Conduct, Rule 4.4, cmt. 3A ("To reduce potential disqualification and to avoid the appearance of impropriety, judicial candidates should, as much as possible, not be aware of those who have contributed to the campaign."); N.D. Code Jud. Conduct, Canon 5(C)(2).

will often interrupt the pitch for money with an answer, or a door to the face." *Id.* at *27. The judicial candidate's "strong impression of the potential donor's likelihood of making a contribution"—just as much as the candidate's actual knowledge of whether the solicited individual contributed—can lead to bias and undercut the appearance of impartiality. *Id.* This Court recognized as much in *White II*, noting that "[k]eeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality[.]" 416 F.3d at 765; *see also Bauer v. Shepard*, No. 09-2963, 2010 WL 3271960, at *5 (7th Cir. Aug. 20, 2010) (noting that "the possibility of reward or retaliation is greatest" with in-person solicitations). Thus, the *Wersal* panel's decision conflicts with this Court's previous *en banc* decision in *White II* and the Seventh Circuit's recent decisions in *Siefert* and *Bauer*, necessitating *en banc* review under Rules 35(b)(1)(A) and 35(b)(1)(B) of the Federal Rules of Appellate Procedure.

Moreover, a direct-solicitation ban serves to prevent a judicial candidate from using the prestige and power of his office in a coercive manner, regardless of the candidate's actual knowledge of a donation (or lack thereof). *See Bauer*, 2010 WL 3271960, at *6 ("The desire to prevent judges from using the prestige of office for other ends underlies a great deal of the Code of Judicial Conduct for United

States Judges. Federal judges can't endorse political candidates or participate in fundraising, even for nonpartisan institutions such as law schools."). The Arkansas Supreme Court recently dealt with a real-world example of such conduct in *Simes v. Ark. Judicial Discipline and Disability Comm'n*, 247 S.W.3d 876 (Ark. 2007). In *Simes*, a state trial judge called two attorneys and separately asked them for campaign contributions. Both attorneys had regularly appeared before the trial judge, and one of them had a case pending before the trial judge. The Arkansas Supreme Court noted that personal solicitations "inevitably place[] the solicited individuals in a position to fear retaliation if they fail to financially support that candidate." *Simes*, 247 S.W.3d at 882. Given the expansive jurisdiction of some courts and the prominence of certain judges, the solicited individual may fear such retaliation even if he is not an attorney and even if the jurisdiction has a "don't learn" clause. In a system where impartiality (and its appearance) matter greatly, states may reasonably prohibit one-on-one personal solicitations without running afoul of the First Amendment. *See Siefert*, 608 F.3d 974 (upholding Wisconsin's ban on direct solicitations of contributions by judicial candidates because it "prevents corruption and preserves impartiality without impairing more speech than is necessary").

Nor is recusal a feasible alternative. As explained in Judge Bye's dissent, some judges will inevitably fail to recuse in the face of well-grounded motions and, moreover, the *appearance* of impartiality will have already been undermined before the filing of such a motion. *Wersal*, 2010 WL 2945171, at *28 (citing *Caperton*, 129 S.Ct. at 2257, which held that a state high court judge's failure to recuse was a violation of due process where a party to the litigation spent over $2.5 million to help get the judge elected). Moreover, it would not be feasible to require recusals in every case in which the target of a solicitation is a litigant because a great many recusals would be required. Even the *Wersal* panel contemplated recusals only in situations where the judge acquires *actual* knowledge of a litigant's contribution (or lack thereof). *Wersal*, 2010 WL 2945171, at *15. If, as explained above, there is harm in the "ask" in addition to actual knowledge of the donation (or lack thereof), the recusal obligation would have to be much broader—potentially to the point of wreaking havoc on the orderly administration of justice.

II. THE PANEL'S FACIAL INVALIDATION OF MINNESOTA'S ENDORSEMENT CLAUSE RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE.

The *Wersal* panel applied strict scrutiny in invalidating Minnesota's endorsement clause, failing to consider the possibility that the more deferential standard used to evaluate restrictions on political speech by government employees

may be applicable. *See Siefert*, 608 F.3d at 984 (upholding Wisconsin's restriction on endorsements by judicial candidates under the rule set forth in *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973)).

In invalidating Minnesota's endorsement clause, the *Wersal* panel reasoned that an endorsement may be a "proxy for expressing [the candidate's] views" and therefore must be invalidated because it restricts speech for or against particular *issues* rather than speech for or against particular *parties*. *Wersal*, 2010 WL 2945171, at *9 (citing *White I*, 536 U.S. at 776). To the contrary, "[e]ndorsements are not simply a mode of announcing a judge's views on an issue, or a shorthand for that view." *Siefert*, 608 F.3d at 983. A judicial candidate remains free to communicate his views on *issues* notwithstanding any restrictions on endorsements.

The panel also criticized Minnesota's endorsement clause because it supposedly prevents endorsements of unlikely litigants such as candidates for President and other out-of-state offices. However, "[l]aws need not contain exceptions for every possible situation in which the reasons for their enactment are not present" because "it is the nature of rules to be broader than necessary in some respects." *Bauer*, 2010 WL 3271960, at *4. In any event, Minnesota's rule was not applied so broadly in *Wersal* because the plaintiff, a candidate for the

Minnesota Supreme Court, desired to endorse only Minnesota candidates (all potential litigants before the Minnesota Supreme Court) rather than hypothetical candidates in other states. *Wersal*, 2010 WL 2945171, at *1. Moreover, the restriction on endorsements serves to prevent judges from using the prestige of their office for political power-brokering, in addition to eliminating the appearance of impartiality with regard to specific litigants. As the *Bauer* court noted, federal judges cannot endorse political candidates under the Code of Conduct for United States Judges, and it is highly doubtful that *White I* "licenses federal and state judges to give stump speeches for candidates running for President, senator, governor, or mayor, or act as leaders in political parties." *Bauer*, 2010 WL 321960, at *6.

The *Wersal* panel also held that judges can always recuse from cases in which the beneficiary of the judge's endorsements becomes a litigant. As Judge Bye explained in dissent, however, this Court's decision in *White II* implicitly recognized that recusals may be a feasible alternative only when it is likely that recusals will be infrequent. *Wersal*, 2010 WL 2945171, at *24. That is not the case where the endorsed candidate is a prosecutor, sheriff, or other frequent participant in the judicial system. Moreover, recusal does nothing to further the state's broader interest in curbing situations in which endorsements "create[] the

perception of a judicial branch beholden to political interests." *Id.* at *21 (Bye, J., dissenting).

CONCLUSION

The *Wersal* panel's ruling diverges from the U.S. Supreme Court's decision in *White I* and this Court's *en banc* decision in *White II.* In addition, the panel's decision conflicts with the Seventh Circuit's recent decisions *Siefert* and *Bauer*, which upheld state rules prohibiting endorsements and in-person solicitations by judicial candidates. As Judge Easterbrook stated, "the judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife." *Bauer*, 2010 WL 3271960, at *7. Given the current legal landscape and the magnitude of the issues at stake, this case necessitates *en banc* review pursuant to Rules 35(b)(1)(A) and 35(b)(1)(B) of the Federal Rules of Appellate Procedure.

Dated: August 26, 2010

Respectfully Submitted,

/s/ David A. Curran
David A. Curran
Assistant Attorney General
Arkansas Bar No. 2003031
Office of the Arkansas Attorney General
323 Center St., Suite 500
Little Rock, AR 72201
(501) 682-3561 (direct)
(501) 682-8118 (fax)
david.curran@arkansasag.gov

Counsel for Amici Curiae

DUSTIN MCDANIEL
Attorney General of Arkansas

TOM MILLER
Attorney General of Iowa

CHRIS KOSTER
Attorney General of Missouri

WAYNE STENEHJEM
Attorney General of North Dakota

MARTY JACKLEY
Attorney General of South Dakota

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2010, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

Stanely Neil Zahorsky, Esq.
5100 Edina Industrial Blvd.
221 Edina Office Building
Edina, Minnesota 55435

/s/ David A. Curran